denied 519 U.S. 823 (1996); and *Pirolo v. Clearwater*, 711 F.2d 1006 (11th Cir. 1983)

Petitioners also believe the Seventh Circuit's ruling conflicts with FAA Record of Decisions in Piedmont Triad International Airport, City of Greensboro, North Carolina, December 31, 2001, located at http://www.faa.gov/arp/app600/5054a/ORDgso.HTM and, Lambert-St. Louis International Airport, September 30, 1998, located at http://www.faa.gov/arp/ace/stl/stl.htm and with FAR 91-13(B).

This petition arises out of attempts by the Respondents to close the Petitioners' existing, state certified and federally endorsed landing facility that was legally established at a time when there was no local ordinance prohibiting or regulating landing facilities.

One of the Respondents' first attempts to close the Petitioners' helipad was to bring suit in Steuben County Superior Court alleging that Daniel Hoagland was violating a zoning ordinance by landing the Petitioners' helicopter on their helipad. Respondents eventually admitted that such a zoning ordinance never existed.

Said admission came only after Respondents obtained a settlement agreement with Petitioners that placed restrictions on Petitioners' use of the helipad, restrictions on ground operations of the helicopter, restrictions on the helicopters hours of operation, restrictions on flight paths of the helicopter despite that all previously used flight paths were in accordance with those approved by the FAA in their Airspace Study. And, also placed restrictions on the heliports' navigation aids.

Said settlement agreement allowed for indefinite continued use of Petitioners' helipad, which Respondents subsequently breached with their next attempt to close the Petitioners' helipad.

After Respondents failed to close Petitioner's helipad by bringing suit in Steuben County Superior Court, Respondents subsequently enacted a post facto zoning ordinance that will close Petitioners' helipad in April 2006.

Petitioners felt aggrieved and in June of 2003, filed a Complaint for Declaratory Judgment and Damages in the United States District Court for the Northern District of Indiana, Fort Wayne Division. Among other forms of relief, Petitioners sought a Declaratory Judgment holding that the Federal Aviation Act preempts a municipality from regulating pilots, from interfering with a federally licensed aircraft operation and helipad use.

The Petitioners believe that the Respondent's actions interfere with air commerce and are an unlawful usurpation of authority expressly reserved to the federal government by the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101 *et seq.*, and specifically under 49 U.S.C. § 41713.

The parties filed cross-motions for summary judgment in the district court. The Respondent's motion was granted, the Petitioners' motion was denied. The Petitioners appealed to the 7th Circuit Court of Appeals. On July 18, 2005 the Seventh Circuit Court of appeals affirmed the judgment of the district court. On October 18, 2005 the Seventh Circuit denied the Petitioners' petition for rehearing enbanc.

Petitioners believe that the following undisputed facts established in the proceedings demonstrate that the

Respondents new zoning ordinance intrudes into federally preempted territory:

- Town Council President Troll stated that the purpose of Ordinance 268 was **"to limit the number of aircraft around the lake, landing and taking off"** *Appx., pp. 204-206, 230.*[1] (emphasis added)

- During the meeting, Town Attorney Don Stuckey stated that the new version would require, in part, that owners of existing helipads **prove to the Town every two years that they have maintained certification as a pilot, provide the Town with "proof of FAA authority" which in turn would include proving that the property owner has a current FAA Medical Certification and Flight Review**. *Appx., pp. 41, 214, 741-742.* The Town Council met again on February 12, 2001, during which meeting Respondent Brown proposed and discussed the new requirement in the ordinance which would require persons who had existing helipads in the Town of Clear Lake **to provide proof of FAA medical certifications and bi-annual flight reviews.** *Appx., pp. 371-373.* (emphasis added)

- The Town Attorney **described Ordinance 268 as an ordinance to regulate aircraft traffic"**. *Appx., pp. 364-366;* see also *Appx., pp. 66-68, 230* (emphasis added.)

- Councilperson Emma Brown testified that in the February 12, 2001 Town Council meeting she stated,

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[1] "*Appx., p___*" refers to Appendix filed at the Court of Appeals.

"we need this new ordinance to keep the yahoos from buzzing the lake." When asked who were the yahoos, Councilperson Brown stated, "we knew Dan (Hoagland) was a safe and good pilot, **but we did not know about any other yahoos that might come in and land or have a pad. So we needed something or an ordinance so that we would be able as a town to verify that."** *Appx.., p 205.*(emphasis added.)

- In the course of discovery of Steuben County Superior Court lawsuit, Respondent Wehrenberg testified that the sole basis for the Town's lawsuit against the Petitioners was that their use of the heliport was a noise problem and violated a zoning ordinance. *Appx., pp. 64-68.*

It is unfortunate that the Seventh Circuits' ruling will have untold adverse affects on numerous other airmen, airports aircraft operations, and air commerce. But only if the decision is allowed to stand.

Disposition Below

In its *Memorandum of Decision and Order*, the District Court granted the Defendants' Motion for Summary Judgment as to the Petitioners' claims for federal preemption, and directed entry of judgment in the Defendants' favor on these claims. (Apx. C p. 24a-28a, 38a) In this *Order*, the District Court denied the Petitioners' Motion for Summary Judgment in its entirety. (Apx. C p. 38a) Following the *Order* of October 28, 2004, no claims or parties remained for disposition by the District Court. *Id.* As such, the *Memorandum of Decision and Order* of October 28, 2004 disposed of all of the legal causes of action asserted before the trial court and, therefore, constituted the final decision of the

District Court on this case. On July 18, 2005, the Seventh Circuit Court of appeals affirmed the judgment of the district court. On October 18, 2005 the Seventh Circuit denied a petition for rehearing enbanc filed by the petitioners.

Basis for District Court's Subject Matter Jurisdiction

The U.S. District Court for the Northern District of Indiana, Fort Wayne Division, ("District Court") had federal question jurisdiction over the above-captioned case pursuant to 28 U.S.C. § 1331. The Petitioners' original and amended Complaints presented federal questions in asserting causes of action for preemption of local ordinances by the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101 *et seq.*, and specifically the express preemption provision of 49 U.S.C. § 41713, previously codified at 49 U.S.C. App. § 1305.

REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit's Decision Conflicts with Prior Opinions from the U.S. Supreme Court.

Petitioners believe the Seventh Circuit's ruling conflicts with the rulings of this Court in *American Airlines v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed.2d 715 (1995) and *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973).

In its opinion, the Seventh Circuit cited *Burbank* in support of the panel's conclusions as to what kinds of regulations are preempted. (Apx. B p. 8a) Although the panel correctly concluded that noise regulation ordinances and flight pattern controls are preempted, the panel, however,

overlooked other pertinent parts of Burbank and thus improperly applied the following Burbank holdings:

> "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption. As Mr. Justice Jackson stated, concurring in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (U.S. 1944), 'Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. **The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.**'" Burbank (1973) (emphasis added).

The preceding emphasized language demonstrates preemption not only applies to aircraft in a flight pattern, but also on the ground at an existing legally established landing facility. It then stands to reason that a local ordinance is preempted from abolishing flight patterns and the operation of aircraft at an existing landing facility by abolishing the facility itself. Again from Burbank,

> "When the House approved the blended provisions of the bill, Senator Tunney moved that the Senate concur. He made clear [FN19] that the regulations to be considered by EPA for recommendation to FAA would include proposed means of reducing noise in airport environments through the application of emission controls on aircraft, **the regulation of** flight patterns and **aircraft and *airport operations***, and modifications in the number, frequency, or scheduling of flights [as well as] . . . the imposition of curfews on

> noisy airports, the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission standards on new and existing aircraft ....." [FN 19] Id., at 37317. *Burbank* (emphasis added.)

The preceding emphasized language clearly demonstrates preemption not only applies to aircraft in flight, or a flight pattern, but also on the ground at an existing legally established landing facility. It then stands to reason that a local ordinance is preempted from abolishing flight patterns, the operation of aircraft, airport operations, and ground mounted air navigation aids at an existing landing facility by abolishing the facility itself.

From the Burbank Dissent:

> "**A local governing body that owns and operates an airport** is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. **A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility.**'" *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973) (emphasis added).

Even in the preceding *Burbank* dissent, the emphasized language demonstrates that the traditional local police power is **limited to closing an existing facility only if they own and operate it, and is limited to preventing the establishment of a new facility, or expansion of existing landing facilities** (although the Federal Aviation Administration has since ruled

otherwise in various Records Of Decisions regarding airport expansion).

Petitioners respectfully submit that the panel erred in its application of federal preemption holdings in *Burbank*, as they should be applied to Petitioners' heliport.

In their summary judgment papers, the Petitioners argued that the Town's ordinances proscribing and/or limiting their pre-existing, licensed heliport and helipads were expressly preempted by the Federal Aviation Act, as amended by the Airline Deregulation Act ("ADA"). *Appx., pp. 396-399.* The District Court's failure to find for such preemption is contrary to applicable authority.

The U.S. Supreme Court has stated that the ultimate touchstone in analyzing the preemptive effect of a statutory scheme such as the FAA and/or ADA is the purpose of Congress. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). A preemption analysis begins "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (*Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)) and with the assumption that the States' historic police powers are not to be superseded, "but that presumption can be overcome where ... Congress has made clear its desire for preemption." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001).

Congress may evidence its intent to preempt either implicitly or explicitly. *Cipollone*, 505 U.S. at 516; see also *Id.*, 505 U.S. 517-22. Pertinent, here, the Federal Aviation Act provides that the airspace in the United States belongs,

exclusively, to our federal government, and that U.S. citizens have a right of transit through U.S. navigable airspace. 49 U.S.C. § 40103. Consistent with this sovereignty provision, this Act, as amended by the ADA, also contains an explicit preemption clause prohibiting any State or local government from regulating matters related to[2] an air carrier's price, route or service. 49 U.S.C. § 41713;[3] *Morales v. TWA*, 504 U.S. 374, 383-84, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). In finding for preemption, the *Morales* Court gave broad scope to the statute's "related to" language (504 U.S. at 383-84) and expressly held that Section 41713(b)(1) preempts "state enforcement actions having a connection with or reference to" airline prices, routes or services and displaces all state laws within its sphere. Id. at 384, 387. "Since *Morales*, Section 41713's preemption provision has been consistently upheld. *American Airlines v. Wolens*, 513 U.S. 219, 224-29, 115 S. Ct. 817, 130 L. Ed.2d 715 (1995); *United Airlines v. Mesa Airlines*, 219 F.3d 605, 607-9 (7th Cir. 2000); *Travel All Over*

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[2] As the Supreme Court noted in *Morales*, that the phrase "related to" ordinarily has a broad meaning: "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" 504 U.S. at 383 (quotation omitted). Although Congress could easily have selected more restrictive terminology to describe the type of state enforcement action or enactment the ADA pre-empts, the provision as written is without language that would produce a more limited preemptive effect. Though by no means self-defining, the phrase "a price, route, or service of an air carrier" appears similarly broad. Congress did not choose to restrict the scope of the word list "price, route, or service" by using the kind of qualifying words or phrases that would have made the list's three terms more definite or focused.

[3] The Federal Aviation Act's definition of an "airport" expressly "includes a heliport." 49 U.S.C. § 47102(2).

the World v. Saudi Arabia, 73 F.3d 1423, 1432-35 (7th Cir. 1996). See also *Botz v. Omni Air Int'l*, 286 F.3d 488, 494 (8th Cir. 2002).

Thus, the issue here, as it was before the Seventh Circuit, is whether the ordinances of the Town of Clear Lake "relate to" or "hav[e] a connection with or reference to" an air carrier's price, route or service.[4] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 2414, 150 L. Ed. 2d 532 (2001) ("task is to identify the domain expressly preempted"). The Seventh Circuit found that because the contested ordinances "regulate how Hoagland uses his land, not how he operates his helicopter; any effect they might have on Hoagland's prices, routes or service is tangential." (Apx. C p. 22a) The Petitioners, however, counter that if a town's ordinances regulate flight operations, paths, or landings, then they necessarily relate to, have a connection with, or reference an air carrier's "price, route or service," regardless of whether the ordinances are labeled land use, zoning or public safety regulations, because if an air carrier is prohibited or restricted by local ordinance from making helicopter landings or departures from their helipads on the ground, then that ordinance impacts and relates to his route.

As such, the Town's Ordinances 268 and § 154.045 should have been declared preempted by 49 U.S.C. §

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[4] The District Court has already recognized that the Respondents did not dispute the fact that Hoagland qualifies as an air carrier within the meaning of the Federal Aviation Act, 49 U.S.C. § 40102(a)(2). (Apx. C p. 22a)

41713(b)(1) and struck down for contravening the Supremacy Clause.[5]

B. The Court of Appeals' Decision Conflicts with Federal Aviation Regulations and with FAA Record of Decisions including Piedmont Triad International Airport, City of Greensboro, North Carolina, and Lambert-St. Louis International Airport.

The panel decision also states, "Cases from the Supreme Court and our sister circuits as well as ***FAA regulations*** support our conclusion." (emphasis added.) (Apx. B p. 7a) Apparently the FAA must be in disagreement, as pointed out in a footnote on page 3 of the Petitioners' Reply Brief, "Moreover, the FAA, acting under authority granted by the U.S. Department of Transportation which is the federal agency charged with administering federal aviation laws as a whole (*American Airlines v. Wolens*, 513 U.S. 219, 229 n.6, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), has issued various Records of Decision stating that local governments do not have any regulatory authority over **airport operations** because long-established doctrines of federal preemption prohibit local communities from regulating aircraft operations."

See, *i.e.*, FAA Record of Decision, Piedmont Triad International Airport, City of Greensboro, North Carolina,

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[5] Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... anything in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. It has long been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981).

December 31, 2001, located at http://www.faa.gov/arp/app600/5054a/ORDgso.HTM; FAA Record of Decision, Lambert-St. Louis International Airport, September 30, 1998, located at http://www.faa.gov/arp/ace/stl/stl.htm.

Petitioners believe these FAA Record of Decisions make it clear that a local government does not have any regulatory authority over ***airport operations***, including authority to close an existing facility not owned by the local government.

Petitioners believe that the panel decision is not supported by, but actually conflicts with FAA regulations (FAR). Just as one illustration, a reading of FAR 91.13(b) demonstrates that regulation of aircraft operations on the ground, even when there ~~is~~ no intention of flight, lies within the province of the FAA.

FAR § 91.13 Careless or reckless operation:

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

(b) *Aircraft operations other than for the purpose of air navigation.* **No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo)**, in a careless or reckless manner so as to endanger the life or property of another. (emphasis added.)

It then stands to reason that when federal control is so pervasive that the FAA regulates the movement of aircraft on the ground even when there is no intention of flight, a local government is preempted from closing an existing facility, which in essence would indirectly control aircraft operation.

C. The Court of Appeals' Decision Creates a Split Between the Circuits.

The Seventh Circuit's decision creates a direct conflict with the decisions of at least nine other circuits that have upheld a non-proprietor municipality is federally preempted from interfering with airport operations, flight patterns, pilot safety and competency.

The panel decision apparently correctly recognized that Petitioners constructed their helipads at a time when Clear Lake had no existing ordinance governing landing strips, and then later, Clear Lake amended it's existing zoning ordinance to designate an "[a]ircraft landing strip, pad, or space" as a "special use" requiring special permission of the Zoning Board of Appeal. The Court acknowledged that the ordinance provided that any preexisting aircraft landing area must be discontinued within 5 years or upon the transfer of the property. (Apx. B p. 5a) What the panel did not properly recognize is that under the panel's decision, any non-proprietor municipality could simply pass a zoning ordinance, or one labeled as such, to close any legally established, existing landing facility, even one that is used by a pilot that meets the definition of "Air Carrier" as defined by 49 U.S.C. § 40102(a)(2). (Apx. C p. 22a) Instead of simply passing an ordinance that undoubtedly would be preempted, such as a curfew, what the municipality did was pass a zoning ordinance that completely abolishes the landing facility entirely. It would stand to reason that if an ordinance that

imposes a curfew were preempted, an ordinance that totally abolishes the use of an existing landing facility would be even more clearly preempted.

Petitioners respectfully submit that the panel erred in it's application of federal preemption as it should be applied to Petitioners' existing, state certified, federally endorsed landing facility that was legally established at a time when there was no local ordinance regulating landing facilities.

The panel decision states in relevant part, "...(the end result of the ordinance) would affect Hoagland's flight routes. Obviously it would. His route would no longer end in Clear Lake." (Apx. B p. 7a) Further down the page it states, "The Clear Lake ordinance is a land use, or zoning ordinance, not a flight pattern regulation." It is a complete contradiction for the panel to state that the result and affect of an ordinance is the elimination of a flight route and then to label the Clear Lake ordinance merely as "a land use, or zoning ordinance, not a flight pattern regulation." A "flight pattern" is clearly part of, if not the same as, a "flight route." Petitioners respectfully assert that the panel erred in labeling the Clear Lake ordinance as a "land use, or zoning ordinance" after correctly stating the results and affect of the ordinance would affect Hoagland's flight route and eliminate his helipad.

Petitioners further suggest that the panel misapprehended Ordinance 268 as merely a "land use, or zoning ordinance", Ordinance 268 § 3 requires owners of existing landing areas to submit "proof of FAA authority and a copy of any flight review within sixty (60) days of each flight review to the Zoning Administrator." Ordinance 268 § 3 also imposes a limit of one aircraft per existing landing area. The following excerpts from Appellants' Brief Pages 5, 12, & 30 further

illustrate why Ordinance 268 intrudes into a federally preempted area.

- Appellants' Brief page 5 states, "Indeed, some of the Defendants-Appellees have admitted that it is their intention to see that the Hoaglands are denied the ability to use their helipads, despite licenses and endorsements from INDOT's Aeronautics Section and the FAA (Appx., pp. 163-164, 247-248, 738-742) and that the purpose of Ordinance 268 was **"to limit the number of aircraft around the lake, landing and taking off"** even though they admitted they "would not know how many would be too many." *Appx., pp. 204-206, 230.* (emphasis added)

- Appellant's Brief page 12 states, "During the meeting, Town Attorney Don Stuckey stated that the new version would require, in part, that owners of existing helipads **prove to the Town every two years that they have maintained certification as a pilot, provide the Town with "proof of FAA authority" which in turn would include proving that the property owner has a current FAA Medical Certification and Flight Review."** *Appx.*, pp. 41, 214, 741-742 "The Town Council met again on February 12, 2001, during which meeting Appellee Brown proposed and discussed the new requirement in the ordinance which would require persons who had existing helipads in the Town of Clear Lake to **provide proof of FAA medical certifications and bi-**

annual flight reviews." *Appx., pp. 371-373.* (emphasis added)

- Appellants' Brief page 30 states, "In seeking to prevent landings and take-offs, the Defendants were necessarily seeking to regulate flight operations or flight paths, since there can be no such operations or paths without landings or take-offs. The Defendants have admitted as much, such as when the Town Attorney **described Ordinance 268 as an ordinance to regulate aircraft traffic**". *Appx., pp. 364-366; see also Appx., pp. 66-68, 230* (emphasis added)

Petitioners respectfully assert that the preceding emphasized language demonstrates that the Panel's decision to label the Clear Lake ordinance merely as "a land use, or zoning ordinance, not a flight pattern regulation..." is clear error that is in need of correction. A plain reading of the above also shows that the ordinance impinges into the federally preempted area of pilot regulation.

As previously mentioned, the panel decision states in relevant part, "The Clear Lake ordinance is a land use, or zoning ordinance, not a flight pattern regulation." (Apx. B p. 7a) The record does not support such a finding. There is not one shred of testimony from town officials stating the Ordinance 268 is a "land use, or zoning ordinance." In fact the record shows otherwise. Appellants' Reply Brief shows that former Town Council President Troll testified under oath that the purpose of Ordinance 268 was, "to limit the number of aircraft around the lake, landing and taking off" even though they admitted they "would not know how many would be too many." *Appx., p 230.* Further on that point,

Councilperson Emma Brown testified that in the February 12, 2001 Town Council meeting she stated, "we need this new ordinance to keep the yahoos from buzzing the lake." When asked who were the yahoos, Councilperson Brown stated, "we knew Dan (Hoagland) was a safe and good pilot, **but we did not know about any other yahoos that might come in and land or have a pad. So we needed something or an ordinance so that we would be able as a town to verify that."** *Appx.., p 205.*(emphasis added.)

Thus, by the town' officials' own testimony it is clear that Ordinance 268 cannot be labeled merely a zoning or land use ordinance and that it in fact reaches far beyond their single local jurisdiction, something that the panel decision called "...unmanageable-say nothing of terrifying..." (Apx. pp. 8a) Further down the page the panel decision instructs us that "noise regulation ordinances" are preempted. Despite the fact that the panel decision is silent concerning whether the intent of Ordinance 268 is a noise ordinance or not, the history of the case does shed light on that question. For example, Appellants' Brief page 7 states, "For instance, in December of 1997, the then Town Council President (Thomas Wehrenberg) directed the Town Marshal (Richard Allen Lehman) to order Hoagland "not to land a helicopter on his state-licensed helipad, because the Town Council does not permit such activity," The above referenced December 1997 letter states in part, "The Town Council of Clear Lake does not permit the landing of aircraft within the corporate limits of the Town as the noise of a low flying aircraft may annoy the citizens..." *Appx., p. 88* (emphasis added.) Appellants' Brief page 8 states, "In the course of discovery of this State court lawsuit, Wehrenberg testified that the sole basis for the Town's lawsuit against the Hoaglands was that their use of the heliport was a noise problem and violated a zoning ordinance. *Appx., pp. 64-68.* Petitioners respectfully submit that the

panel overlooked the facts stated above, which without a doubt, reveal that the impetus of Ordinance 268 was **noise** as perceived by the town officials. Given that the Seventh Circuit acknowledged prevailing precedent dictates that "noise regulation ordinances" are preempted, it then follows that the panel decision conflicts with said prevailing precedent and is in need of correction by this Court.

The panel decision also states, "We are not convinced that Congress meant to take the ***siting*** of airfields out of the hands of local officials. The ***siting*** of an airfield----so long as it does not interfere with existing traffic patterns, etc, ---- remains an issue of local control (emphasis added). (Apx. B p. 7a) Perhaps the Petitioners are not convinced of that either. However, the Petitioners respectfully submit that the major difference in this case, is that the Petitioners are not ***siting*** a new landing facility. Hoaglands' heliport was in existence for five years prior to the adoption of Clear Lake Ordinance 268. This is not a case of ***siting*** a new facility.

The panel's decision also incorrectly applies the federal preemption doctrine regarding airports as it should be applied to the ***siting*** of new landing facilities versus ***existing*** facilities that were legally established prior to enactment of any local ordinance. (Apx. B p. 7a) This is demonstrated in *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338 (9th Cir. 1992). In circumstances factually analogous to Hoagland' heliport, the Ninth Circuit held that a municipal regulation conditioning the construction of runways on prior city approval of the placement of those runways was preempted under the Federal Aviation Act. In declaring the ordinance invalid, the Ninth Circuit stated:

> "It is settled law that non-proprietor municipalities are preempted from regulating airports in any manner that

> directly interferes with aircraft operations. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, ... Although the City of Los Angeles concedes that it is prohibited from controlling aircraft operations, it argues that this Ordinance is a legitimate exercise of the City's police powers that in no way impinges upon the areas preempted by federal regulation. We disagree.
>
> The problem with this Ordinance is that it conditions the construction and reconstruction of taxiways and runways on the prior approval of the City. This the City may not do. The proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace. **The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law."** *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338 (9th Cir. 1992) (emphasis added).

Again, according to prevailing precedent, if a non-proprietor municipality is preempted from regulating airports in any manner that directly interferes with aircraft operations, and if the regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law, then a non-proprietor municipality is preempted from abolishing an existing landing facility, and thus, the panel decision conflicts with said governing precedent and is in need of correction.

The panel decision states, "In *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3rd Cir. 1999), the court found air safety regulations preempted. And a state statute requiring

drug testing of pilots was found to be preempted in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989)." (Apx. B p. 8a) The Petitioners agree with the panel that the regulation of pilot safety or competency by an entity other then the Federal Government is preempted. The problem with the Clear Lake ordinance is that it clearly contains provisions relating to pilot safety and/or competency. Ordinance 268 § 3 requires owners of existing landing areas to submit "proof of FAA authority and a copy of any flight review within sixty (60) days of each flight review to the Zoning Administrator." Further, *Appellant's Brief page 12* states:

> "During the meeting, Town Attorney Don Stuckey stated that the new version would require, in part, that owners of existing helipads **prove to the Town every two years that they have maintained certification as a pilot, provide the Town with "proof of FAA authority" which in turn would include proving that the property owner has a current FAA Medical Certification and Flight Review**. *Appx., pp. 41, 214, 741-742* The Town Council met again on February 12, 2001, during which meeting Appellee Brown proposed and discussed the new requirement in the ordinance which would require persons who had existing helipads in the Town of Clear Lake **to provide proof of FAA medical certifications and bi-annual flight reviews."** *Appx., pp. 371-373.*

It is apparent that the panel ignored the preceding emphasized language that undeniably demonstrates that Ordinance 268 intrudes into the federally preempted area of pilot safety and/or competence. When Respondent Brown represented that ordinance amendments were designed to require pilots to provide the Town with FAA medical certifications and bi-annual flight reviews, *Appx., pp. 189-*

190, 233, the town intruded into a federally preempted area. The power to regulate pilot safety, proficiency, competency, physical fitness, etc., is reserved to the federal government. *French v. Pan Am Express, Inc., 869 F.2d 1* at 6 *(1st Cir. 1989)*; *Pirolo v. Clearwater*, 711 F.2d at 1010 (11th Cir. 1983). The panel decision is clear error that is undoubtedly in need of correction.

The panel decision states, "A case specifically on point is *Condor Corporation v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990), in which the court found there was no preemption in the denial of permission to operate a heliport." (Apx. B p. 9a) Again the panel decision in the present case is actually in conflict with *Condor*. In *Condor*, the city's zoning ordinance prohibited the **initial *siting*** of a heliport and thus was not preempted by federal law. The facts in these proceedings are that the Hoaglands' heliport was already established and licensed by INDOT and the FAA years before the Town of Clear Lake adopted Ordinance 268. Petitioners respectfully assert that there is nothing "on point" with the initial siting of a heliport verses an ordinance that abolishes an existing heliport. Thus, the panel's decision was clear error in need of correction by this Court.

In the opinion, *Gustafson* is cited in support of the panel's decision. (Apx. B p. 9a) However, the panel decision is actually in conflict with *Gustafson*. The Sixth Circuit in *Gustafson* distinguished the *Price v. Charter Township of Fenton*, 909 F. Supp. 498 (E.D. Mich. 1995) opinion: "We find *Price* distinguishable from the present case because the regulation at issue in *Price* concerned the frequency of flight operations at the plaintiff's airport, not ***whether an airport could be established in the first place***." (at page 786 n. 7). *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996). The facts of these proceedings are that the Hoaglands'

heliport was already established and licensed by INDOT and the FAA years before the Town of Clear Lake adopted Ordinance 268. Also in *Gustafson*, the city had had a pre-existing ordinance for thirty years prohibiting aircraft landings exactly where Mr. Gustafson started landing his seaplane. See *City of Lake Angelus v. Mich. Aero. Comm'n*, 676 N.W.2d 642, 643, 260 Mich. App. 371, 374 (Mich. Ct. App. 2004).

Most instructive, though not controlling, is the dissent by Harlington Wood, Jr., Circuit Judge, in *Vorhees v. Naper Aero Club*, 272 F.3d 398 (7th Cir. 2001). In this case Defendant Naper Aero Club, Inc. operates a small private airport, adjacent to the southern boundary of the Vorhees Farm. In 1995, Vorhees unsuccessfully brought a previous state court suit against various defendants seeking only an injunction prohibiting defendants from taking off or landing on their runway in question. The defendants removed the case to federal court. In an unpublished opinion, although the Seventh Circuit advised Mr. Vorhees that he would probably not prevail in obtaining an injunction due to federal preemption, they did not rule on the preemption issues but vacated the decision of the district court and remanded to the district court to be remanded to the state court. *Vorhees v. Brown*, 134 F.3d 375, 1998 WL 54657 (7th Cir. Feb 4, 1998).

This Petitioner believes the following excerpts from Judge Wood's dissent helps illustrate that federal preemption extends to preventing a local government from closing an existing landing area by enacting an ordinance after the facility was established.

> "As the United States succinctly points out in its amicus brief supporting the district court's dismissal of plaintiff's case:

> 'Pursuant to its Commerce Clause power, Congress has preempted state regulation of navigable airspace. Since 1926, federal law has asserted for the United States, 'complete and exclusive national sovereignty in the air space' over this country. *United States v. Causby*, 328 U.S. 256, 250 [sic] (1946), citing the Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926), as amended by the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938). In 1958, Congress reenacted this provision as part of the Federal Aviation Act of 1958. 72 Stat 731, Pub. L. No. 85-726, See 49 U.S.C. § 1508(a) (1993). In 1994, Congress recodified and altered the phrasing of the preemption provision. The provision not states: **'The Untied States Government has exclusive sovereignty of airspace of the United States.'** 49 U.S.C. § 40103(a).

Federal law defines "navigable airspace" to include "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(a)(30). Were flight not completely preempted but left to all the state courts across this country, air transportation could only be chaotic and dangerous. **Runway use cannot be viewed separately. Runways cannot be used for takeoffs and landings without affecting flight patterns**.... Our court has already had a say about the problem in *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974). As the panel in *Kohr* noted, early in the jurisprudence of this country, the control of navigable water was moved from state to federal control. *Id.* at 403-404. (quoting *Northwest*

Airlines, Inc. v. State of Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring). As we stated in *Kohr*, quoting *Northwest Airlines*: Air as an element in which to navigate is even more inevitably federalized by the commerce than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under intricate system of federal commands. **The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls**....Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government. *Id.* at 404 (quoting *Northwest Airlines, Inc.*, 322 U.S. 303 (Jackson, J. concurring). n1 (emphasis added.)

> n1 In some smaller airports where there may not be an operating control tower, there are applicable federal rules and procedures for all pilots to follow. The Aircraft Owners and Pilots Association ("AOPA"), Washington, D.C., publishes a very useful Handbook for private pilots which contains the federal aviation regulations and other helpful information concerning departing from or landing at airports without an operating control tower. Furthermore, contrary to the issuance

> of a driver's license by a state, federal aviation regulations provide that no person in the United States may pilot a plane unless that person has in his possession a current pilot certificate (commonly referred to as a pilot's license) issued to that person pursuant to federal aviation regulations. No state can issue pilot certificates.'
>
> I must respectfully DISSENT." *Vorhees v. Naper Aero Club*, 272 F.3d 398 (7th Cir. 2001) (Harlington Wood, JR., dissenting).

This petitioner respectfully asserts that the foregoing dissent illustrates that federal preemption does, in fact, prevent a local government from closing existing landing facilities by enacting an ordinance. This is especially so, when viewed in conjunction with the following state court decisions.

Greater Westchester Homeowners Association v. City of Los Angeles, 603 P.2d 1329 (Cal. 1979). "Either by way of stipulation or from undisputed evidence, the following significant facts were established: **The federal government exercises exclusive control over aircraft 'in flight' defined as all movement of the plane from departure to arrival gates."** (emphasis added)

City of Burbank v. Burbank-Glendale-Pasadena Airport Authority, 85 Cal. Rptr. 2d 28 (Cal. Ct. App. 1999). "Federal sovereignty of the airspace of the United States is exclusive. (49 U.S.C. 40103 (a)(1)). The Federal Aviation Administration has the sole authority to regulate the use of airspace as necessary to ensure its efficient use and the safety of aircraft. (49 U.S.C. 40103(b)(1)). **This authority**

includes all aspects of aviation, including air control towers, radio navigation systems, and other navigation aids. (*Bethman v. City of Ukiah*, 216 Cal.App.3d 1395, 1403 (1989)). (emphasis added.)

This Petition asserts that when it is so well established that preemption extends to all movement of the plane from departure to arrival gates, to ground based facilities such as air control towers, radio navigation systems, and other navigation aids, it is abundantly clear that a local ordinance that closes an existing landing facility is preempted.

D. The Court of Appeals' Decision has decided an important question of federal law and affects air commerce.

This case apparently is one of first impression, sets new Seventh Circuit precedent, and presents questions of exceptional importance; especially since the decision will potentially affect air commerce; and impact 5,286 public and 14,286 private U.S. landing facilities, and 625,011 certificated pilots. (www.aopa.org/whatsnew/factcard.pdf)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 17, 2006

APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 04-4045

[Filed October 18, 2005]

DANIEL HOAGLAND, KAREN HOAGLAND, HOAGLAND FAMILY LIMITED PARTNERSHIP,and CLEARANCE LAKE MANAGEMENT CORPORATION,
Plaintiff-Appellant;

v.

TOWN OF CLEAR LAKE, INDIANA; ROBERT D. TROLL, DEROLD H. COVELL, EMMA J. BROWN, WILLIAM GEIGER, JOE DRIVER, AND THOMAS REITH, individually and in their official capacity as current and former members of the Clear Lake Town Council and Plan Commission; THOMAS WEHRENBERG, in his official capacity as a former member of the Clear Lake Town Council and Plan Commission; RICHARD ALLEN LEHMAN, individually and in his official Town of Clear Lake Marshal and Clear Lake Zoning Inspector; JULIE AZCHRICH, BARB DISSER, ALAN B. LARUE, AND THOMAS REITH, individually and in their

official capacity as current and former members)
of the Board of Zoning Appeals of the Town of)
Clear Lake, Indiana,)
Defendants-Appellees.)
)

OPINION

JUDGES: Before Hon. RICHARD D. CUDAHY, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

ORDER

On August 1, 2005, the plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petition for rehearing and rehearing en banc is therefore DENIED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 04-4045

[Filed July 18, 2005]

DANIEL HOAGLAND, KAREN HOAGLAND, HOAGLAND FAMILY LIMITED PARTNERSHIP, and CLEARANCE LAKE MANAGEMENT CORPORATION,
Plaintiff-Appellant;

v.

TOWN OF CLEAR LAKE, INDIANA; ROBERT D. TROLL, DEROLD H. COVELL, EMMA J. BROWN, WILLIAM GEIGER, JOE DRIVER, AND THOMAS REITH, individually and in their official capacity as current and former members of the Clear Lake Town Council and Plan Commission; THOMAS WEHRENBERG, in his official capacity as a former member of the Clear Lake Town Council and Plan Commission; RICHARD ALLEN LEHMAN, individually and in his official Town of Clear Lake Marshal and Clear Lake Zoning Inspector; JULIE AZCHRICH, BARB DISSER, ALAN B. LARUE, AND THOMAS REITH, individually and in their official capacity as current and former members

of the Board of Zoning Appeals of the Town of)
Clear Lake, Indiana,)
Defendants-Appellees.)
)

OPINION

EVANS, *Circuit Judge*.

This lawsuit, accurately described by Magistrate Judge Roger B. Cosbey as a feud, pits Daniel Hoagland and the other plaintiffs,[1] owners of a heliport, against the town fathers of Clear Lake, Indiana, a very small and apparently wealthy community ringing the shores of an inland lake in northeastern Indiana. The town wants to get rid of the heliport and has amended its zoning ordinance (which originally did not mention landing strips) to make it applicable to landing strips and to require that the use of all preexisting unapproved landing areas be discontinued within 5 years. At some point, Hoagland made his opposition to the town's actions rather clearly known by posting a homemade "No Trespass" sign warning that "this land is privately owned by an American national, with sovereign rights of God the Creator," and that "violations of the owners [sic] Private Christian, or property rights . . . shall be assessed a civil penalty of one million dollars in U.S. Dollars for each violation" as well as "up to ten years in prison." (Underlining omitted) It is no wonder, then, that the plaintiffs challenged the town's right to regulate landing strips in the present case--which is, by the way, not the only litigation involving these parties. In this case, the parties filed cross-motions for summary judgment in the

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[1] When we refer to "Hoagland," we mean Daniel Hoagland, clearly the moving force behind this lawsuit.

district court. The defendants' motion was granted and the plaintiffs appeal. Our review is *de novo. Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638 (7th Cir. 2005).

Hoagland, a licensed pilot, lives in Clear Lake and commutes by helicopter to his electrical contracting business 60 miles away in Fort Wayne. To make his helicopter commute user-friendly, he constructed two landing pads on his property in Clear Lake. In 1999, the town sued Hoagland in Steuben County (Indiana) Superior Court, alleging that the helicopter takeoffs and landings were a "public nuisance." The case was submitted to mediation. Although Hoagland did not know it, at that time Clear Lake had no existing ordinance governing landing strips, but, Hoagland contends, during the negotiations Clear Lake officials often alluded to one. Eventually a settlement was reached in which Hoagland agreed to abide by several restrictions on the helicopter operations and, in turn, Clear Lake agreed to pay him a sum "to be negotiated." Hoagland claims Clear Lake never paid him anything and that he would not have agreed to the settlement had he known there was no ordinance in effect at the time.

Following the mediation, Clear Lake amended its existing zoning ordinance to designate an "aircraft landing strip, pad, or space" as a "special use" requiring special permission of the Zoning Board of Appeals. It also provided that any preexisting unapproved aircraft landing area must be discontinued within 5 years or upon the transfer of the property.

One of the issues raised in this appeal is whether the ordinance should be invalidated because it is preempted by the Federal Aviation Act, 49 U.S.C. § 40101 et seq.

The preemption doctrine is based in the Supremacy Clause of the Constitution, which states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the land." U.S. Const., art. VI, cl. 2. The clause has been interpreted as supporting three ways in which federal law can preempt state and local law: express preemption, conflict (or implied) preemption, and field (or complete) preemption. *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002). Express preemption occurs when a federal statute explicitly states that it overrides state or local law. Conflict preemption exists if it would be impossible for a party to comply with both local and federal requirements or where local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). Field preemption occurs when federal law so thoroughly "occupies a legislative field" as to make it reasonable to infer that Congress left no room for the states to act. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).

In the district court, according to Judge Cosbey, the plaintiffs' briefs were "hazy" on which preemption theory was being propounded. On appeal, it seems relatively clear they are relying on express preemption. They contend that 49 U.S.C. § 41713(b)(1) preempts the local ordinance. That section provides:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law

> related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

The question, then, is whether the Clear Lake ordinance relates to "price, route, or service of an air carrier."

The plaintiffs argue that restricting Hoagland from making landings or departures from his helipad necessarily affects his route, and the ordinance is thus preempted. In support of this argument they point out that the helipads have been formally approved by federal and state authorities. In January 1996 and December 2000, the Federal Aviation Administration (FAA) issued Airspace Determinations which stated that daytime visual helicopter operations can be safely conducted at the Clear Lake Heliport. In February of 1996, the State of Indiana Department of Transportation Aeronautics Section issued a Certificate of Site Approval certifying that the Clear Lake Heliport has met the administrative requirements for a private-use heliport.

There is at least superficial force to the argument that the elimination of his helipad (the end result of the ordinance) would affect Hoagland's flight routes. Obviously it would. His route would no longer end in Clear Lake. But the question for us is whether the statute preempts so much, and we conclude that it does not. The Clear Lake ordinance is a land use, or zoning, ordinance, not a flight pattern regulation. We are not convinced that Congress meant to take the siting of air fields out of the hands of local officials. The siting of an airfield--so long as it does not interfere with existing traffic patterns, etc.--remains an issue for local control.

Cases from the Supreme Court and our sister circuits as well as FAA regulations support our conclusion. To see what is not preempted, we will first look at the kinds of regulations

which are preempted. These include noise regulation ordinances and flight pattern controls. In *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 36 L. Ed. 2d 547, 93 S. Ct. 1854 (1973), the Supreme Court determined that in light of the pervasive nature of the scheme of federal regulation of aircraft noise, as evidenced by the Noise Control Act of 1972, the FAA and the Environmental Protection Agency had full control over airport noise, preempting local control. The Court of Appeals for the Eleventh Circuit followed suit in *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983), finding that local ordinances prohibiting night operations and proscribing air traffic patterns were preempted. The Court of Appeals for the Ninth Circuit found that curfews on aircraft flights were preempted in *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981).

In *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), the court found air safety regulations preempted. And a state statute requiring drug testing of pilots was found to be preempted in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989).

These cases have one thing in common. They involve issues which reach far beyond a single local jurisdiction and which cannot sensibly be resolved by a patchwork of local regulations. It would be unmanageable--say nothing of terrifying--to have local control of flight routes or of flight times. Such things require nationwide coordination. But the issue of where a local governing body chooses to site an airport is different. When an airport is proposed, the FAA makes a determination of the safe and efficient use of the airspace in regard to the airport, but in situations such as the one before us, the agency leaves the decision not to allow a landing strip to the discretion of the local government.

A case specifically on point is *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 219 (8th Cir. 1990), in which the court found there was no preemption in the denial of permission to operate a heliport:

> Here, Condor asserts the City's action in denying its permit conflicts with the FAA's regulation of airspace. We see no conflict between a city's regulatory power over land use, and the federal regulation of airspace, and have found no case recognizing a conflict. *See, e.g., Wright v. County of Winnebago*, 73 Ill. App. 3d 337, 29 Ill. Dec. 347, 352, 391 N.E.2d 772, 777 (1979) (FAA does not preempt local zoning authority); *Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 390 A.2d 1177 (1978) (same). We therefore reverse and remand to the district court to dismiss the claim for lack of federal jurisdiction.

Similarly, in *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 783 (6th Cir. 1996), the court considered whether a city's prohibition against landing seaplanes on a city lake was preempted. Determining that a lake landing site was analogous to an airstrip on land, the court found that the prohibition was not preempted:

> We believe the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight is distinguishable from the regulation of the designation of plane landing sites, which involves local control of land (or, in the present case, water) use.

The court looked for guidance to FAA regulations, specifically 14 C.F.R. § 157.7(a).

The regulation is instructive. It provides, as to proposed airports, that the FAA will conduct an aeronautical study and issue a determination, considering matters such as the effect the proposed airfield would have on existing traffic patterns of neighboring airports and the effects on the existing airspace structure. But a "determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts." Implicit in the regulation is that the FAA will determine whether it has any objections to a proposed site, and if it does, the conditions set out in its objections must be met. But, on the other hand, if the FAA has no objection, before it can build an airfield the proponent must comply with local laws. In other words, the FAA leaves land use issues primarily to local governments.

In this case, the FAA Airspace Determination letters, which Hoagland obtained, recognize the boundaries of FAA determinations and make clear that certain issues remain for local control. Both letters contain basically the same language. We will quote from the December 2000 letter:

> This determination does not mean FAA approval or disapproval of the physical development involved in the proposal. It is a determination with respect to the safe and efficient use of airspace by aircraft and with respect to the safety of persons and property on the ground.
>
> In making this determination, the FAA has considered matters such as the effect the proposal would have on existing or planned traffic patterns of neighboring airports, the effects it would have on the existing airspace structure and projected programs of the FAA,

> the effects it would have on the safety of persons and property on the ground, and the effects that existing or proposed man-made objects (on file with the FAA) and known natural objects within the affected area would have on the heliport proposal.
>
> The FAA cannot prevent the construction of structures near a heliport. The heliport environs can only be protected through such means as local zoning ordinances or acquisitions of property rights.

Then the letters state quite clearly that local control remains:

> This determination in no way preempts or waives any ordinances, laws, or regulations of any government body or agency.

The situation before us involves a local land use issue, which is clearly left to local control. For that reason, the Clear Lake ordinance is not preempted.

The plaintiffs also raise an issue of inverse condemnation. They seek compensation under the Takings Clause of the Fifth Amendment for the inverse condemnation of the land by Ordinance 268, adopted on April 9, 2001. Although inverse condemnation is a recognized cause of action, the plaintiffs come up short on this issue as well because their claim is not ripe.

Inverse takings claims under the United States Constitution do not become ripe until adequate state remedies are exhausted. Until that time, no constitutional violation has occurred. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the Court pointed out that the

Fifth Amendment does not proscribe the taking of property, but only the taking without just compensation. If a state provides adequate procedures of seeking just compensation, there can be no violation until the procedures have been used and compensation has been denied. This principle has recently been reaffirmed. In *San Remo Hotel, L.P. v. City & County of San Francisco*, 2005 U.S. LEXIS 4848, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), the Court determined that even though the Full Faith and Credit Clause precludes federal court relitigation of issues which were, in fact, decided in a state court case, nevertheless the ripeness rule of *Williamson County* still applies, and plaintiffs must take their case for compensation to the state courts. We have previously determined that Indiana law provides an adequate state remedy through Ind. Code § 32-24-1-16; *see SGB Fin. Servs., Inc. v. Consolidated City of Indianapolis-Marion County, Indiana*, 235 F.3d 1036 (7th Cir. 2000).

The plaintiffs say that they have, in fact, exhausted their state remedies because of a counterclaim filed in a lawsuit in 1999 asserting damages for inverse condemnation. That counterclaim, however, can have nothing to do with an alleged taking in 2001. The district court properly dismissed the inverse condemnation claim.

The civil rights claims--pursuant to 42 U.S.C. § § 1983, 1985, and 1986--were also properly dismissed for a number of reasons, not the least of which is the statute of limitations. For § § 1983 and 1985 claims, the statute of limitations is determined by the law of the state in which the violation took place. *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). Indiana's statute of limitations for personal injury claims is 2 years. Ind. Code § 34-11-2-4; *Coopwood v. Lake County Cmty. Dev. Dep't*, 932 F.2d 677 (7th Cir. 1991). Section 1986 contains its own one-year

statute of limitations. All of the claims here are outside these limitations periods. This lawsuit was filed on June 23, 2003. The civil rights claims are based on the 1999 filing of the state court suit; the alleged misrepresentations during settlement negotiations, which occurred on April 14, 2000; and the enactment of the ordinances, which were last substantively amended on April 9, 2001. The attempts to cast the claims in ways which would avoid the limitations problem are unavailing. The continuing violation doctrine, the discovery rule, and the doctrine of equitable estoppel all are inapplicable to the particular facts of this case.

Finally, Judge Cosbey certainly acted wisely when he refused to exercise supplemental jurisdiction over Hoagland's many state law claims. Those claims, some of which raise novel questions--for example, Hoagland alleges that the Town of Clear Lake has never been "recognized as a legal entity"--are best left for decision by the state courts of Indiana.

For all of these reasons, the judgment of the district court is AFFIRMED.

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

Case No. 1:03-CV-241

[Filed October 28, 2004]

DANIEL HOAGLAND, et. al., Plaintiffs,	)
v.	)
TOWN OF CLEAR LAKE, INDIANA, et al., Defendants.	)

OPINION BY: Roger B. Cosbey

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

This case is the latest chapter in a seven-year, multi-lawsuit feud between Defendant Town of Clear Lake,

Indiana, and one of its residents, Plaintiff Daniel Hoagland.[1] The history of ill will and litigiousness between the parties is considerable: Hoagland has served multiple "Notices of Tort Claims" on Clear Lake (some demanding as much as $ 200,000,000), the parties have slugged it out twice in Indiana state court, and Hoagland has now alleged several violations of his constitutional rights in federal court. At one point, Hoagland even posted on his property a homemade "No Trespass" sign warning Clear Lake officials that "This land is privately owned by an American national, with sovereign rights of God the Creator," and making the startling claim that "Violations of the owners Private Christian, or property rights . . . shall be assessed a civil penalty of one million dollars in U.S. Dollars for each violation," as well as "up to ten years in prison." (*See* Aff. of Robert Troll, Ex. 6.)

This bitter dispute centers on, of all things, Hoagland's preferred method of commuting to work. Hoagland routinely pilots a helicopter between his home in Clear Lake and his business in Fort Wayne, Indiana, roughly sixty-one miles away. To that end, his Clear Lake property includes a heliport, hangar, and two helicopter landing pads. Over the years, Clear Lake has made several attempts to limit Hoagland's use of these amenities, and Hoagland has fought them at every step.

The feud has now spilled over into federal court, with Hoagland bringing a flurry of federal constitutional and state-

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[1] The other plaintiffs in this case are Hoagland's wife and two businesses under his control, and the other defendants are (or were) officials of the Town of Clear Lake. These other parties play a minor role in the case, so for simplicity's sake, this opinion refers to Plaintiffs as "Hoagland" and Defendants as "Clear Lake."

law claims, both for damages and for invalidation of certain Clear Lake ordinances.[2] However, for the reasons given below, none of Hoagland's federal claims survive summary judgment, and this Court must decline to exercise its supplemental jurisdiction over Hoagland's state-law claims. In short, although Hoagland strives mightily to make a federal case out of his squabble with Clear Lake, he can get no relief here.

II. FACTUAL AND PROCEDURAL BACKGROUND

Clear Lake is a small town in the northeast corner of Indiana, with less than 300 residents and only one full-time government employee. (Troll Aff. P 2.) Its ordinances include the 35-page-long Ordinance 84, a "Master Plan . . . providing for the zoning of the incorporated area of the town," which aims to "regulate the . . . use of land" in Clear Lake. (Second Am. Compl., Ex. C at 1.)

On August 12, 1999, Clear Lake sued Hoagland in Steuben County Superior Court. (*Id.*, Ex. B.) The original complaint alleged that the helicopter takeoffs and landings at Hoagland's residence constituted a "public nuisance" and prayed for a permanent injunction prohibiting them. (*Id.*) Although this complaint did not allege violations of any specific Clear Lake ordinances (*see id.*), Hoagland claims that Clear Lake later amended its complaint to allege violations of specific ordinances (Mem. of Law in Supp. of Pl.'s Mot. for

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[2] This Court has subject matter jurisdiction under 28 U.S.C. § 1331. Jurisdiction of the undersigned Magistrate Judge is based on 28 U.S.C. § 636(c), all parties consenting.

Summ. J. at 5).[3] However, a Clear Lake official later admitted that there were no ordinances at that time prohibiting helicopter use in the town. (Troll. Dep. at 60.) Hoagland answered the complaint and asserted counterclaims, including the charge that Clear Lake committed an "inverse condemnation" of his property. (Pl.'s Desig. of Evid., Ex. 7 P 35.)

Hoagland and Clear Lake submitted the case to mediation on April 14, 2000. (Aff. of Daniel Hoagland P 15.) According to Hoagland, Clear Lake officials repeatedly claimed at mediation that "an existing zoning ordinance clearly prohibited the use of his heliport and landing pad" (*id.* P 16), even though, as noted above, no such ordinance existed at that time. Hoagland eventually acquiesced in a "Settlement Agreement" in which, among other conditions, Hoagland agreed to drop most of his claims and abide by several restrictions on his helicopter operations, while Clear Lake dropped its claims and promised to pay Hoagland an indeterminate sum "to be negotiated" with its insurance company.[4] (Pl.'s Desig. of Evid., Ex. 10.) Hoagland avers that he agreed to this settlement only because of Clear Lake's alleged misrepresentations about an ordinance prohibiting use of his heliport. (Hoagland Aff. P 20.) He also testifies that

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[3] The portion of the record cited by Hoagland to support this fact does not contain a copy of the alleged amended complaint.

[4] According to Hoagland, a portion of the lawsuit was not resolved by the Settlement Agreement, and it proceeded to a jury trial in early 2004, where Hoagland recovered damages of $ 14,716.91. (Pl.'s Mem. in Supp. at 15.) The record is unclear on which claims were resolved by the Settlement Agreement and which were resolved by this jury trial.

Clear Lake never paid him anything under the Settlement Agreement. (*Id.* P 18.)

On May 8, 2000, Clear Lake began the process of amending Ordinance 84, the master zoning ordinance, to cover aircraft landing areas. (*See* Pl.'s Desig. of Evid., Ex. 13 at 1.) After many months of discussion by the Town Council and the Plan Commission (*see* Pl.'s Mem. in Supp. at 8-14), Clear Lake adopted Ordinance 268 on April 9, 2001 (Troll Aff., Ex. 8). Ordinance 268 designates an "aircraft landing strip, pad, or space" as a "special use" requiring special permission of the Zoning Board of Appeals. (*Id.*; Second Am. Compl., Ex. C at 14.) It also provides that any preexisting unapproved aircraft landing area must be discontinued within five years of the ordinance's passage or upon transfer of the subject property (whichever comes first), subject to one exception which need not be detailed here.[5] (Troll Aff., Ex. 8.)

In August 2001, Hoagland applied to the Federal Aviation Administration for a "Public Use Designation" for his heliport. (Hoagland Aff. P 30.) According to Hoagland, Clear Lake falsely told the Administration that a court order

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[5] Clear Lake later had its ordinances codified and published, and in the published version of this ordinance (codified as "§ 154.045) there is no exception. That is, the published version simply states that any preexisting unapproved aircraft landing area must be discontinued after five years or upon transfer of the subject property, whichever comes first. (*See* Pl.'s Desig. of Evid., Ex. 27.) Clear Lake believes that this was an error by the publisher, and it has since adopted Ordinance 288, which reinserts the exception. (Troll Aff. P 14.)

prohibited public use of the heliport, and the Administration denied his application as a result. (*Id.*)

Hoagland reports that he recently brought a new lawsuit against Clear Lake in Steuben County Superior Court. The new suit alleges contract and tort claims based on Clear Lake's alleged failure to pay Hoagland under the Settlement Agreement, and it remains pending in state court. (Pl.'s Mem. in Supp. at 15.) Hoagland claims that, in the course of this new suit, he discovered for the first time that there was no ordinance prohibiting use of his heliport when Clear Lake first sued him in 1999. (*See id.* at 6-8.)

Hoagland filed the instant suit on June 23, 2003. (*See* Compl.) The parties filed cross-motions for summary judgment on July 30, 2004. (Docket # 54, 59.) Hoagland also filed a motion to strike (Docket # 68) and a motion for oral argument (Docket # 72), and Clear Lake filed two motions to strike (Docket # 61, 73) and a motion for leave to file supplemental affidavits (Docket # 74). All are now ripe for decision.

III. STANDARD OF REVIEW

Summary judgment may be granted only if there are no disputed genuine issues of material fact. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). When ruling on a motion for summary judgment, a court "may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Id.* The only task in ruling on a motion for summary judgment is "to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). If the evidence is such that a

reasonable factfinder could return a verdict in favor of the nonmoving party, summary judgment may not be granted. *Payne*, 337 F.3d at 770. A court must construe the record in the light most favorable to the nonmoving party and avoid "the temptation to decide which party's version of the facts is more likely true," as "summary judgment cannot be used to resolve swearing contests between litigants." *Id.* However, "a party opposing summary judgment may not rest on the pleadings, but must affirmatively demonstrate that there is a genuine issue of material fact for trial." *Id.* at 771.

The existence of cross-motions for summary judgment does not necessarily mean that there are no genuine issues of material fact. *R. J. Corman Derailment Serv., Inc. v. Int'l Union of Operating Eng'rs*, 335 F.3d 643, 647 (7th Cir. 2003). Rather, the process of taking the facts in the light most favorable to the nonmovant, first for one side and then for the other, may reveal that neither side has enough to prevail without a trial. *Id.* at 648. "With cross-motions, [the Court's] review of the record requires that [the Court] construe all inferences in favor of the party against whom the motion under consideration is made." *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001) (quoting *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998)).

IV. DISCUSSION

Hoagland brings a dizzying array of claims in this case. He first argues that Ordinances 84, 268, § 154.045, and 288 ("the Ordinances") should be invalidated because (1) they are preempted by federal law; (2) Clear Lake was never properly incorporated and thus has no power to adopt ordinances; (3) the heliport is outside Clear Lake's territorial limits and thus not subject to the Ordinances; and (4) the Ordinances were

not enacted pursuant to a valid "comprehensive plan." He then claims that Clear Lake, and in some cases the other individual defendants, owe him damages for (5) inversely condemning his property, which entitles him to just compensation under the Takings Clause of the Fifth Amendment; (6) violating 42 U.S.C. § 1983 by depriving him of several constitutional rights; (7) violating 42 U.S.C. § § 1985 and 1986 by conspiring to deprive him of constitutional rights and failing to prevent such a conspiracy; and (8) committing actual or constructive fraud.

Of these claims, only (1), (5), (6), and (7) arise under federal law. For the reasons given below, the Court will grant summary judgment to Clear Lake on (1), (6), and (7), and dismiss (5) for lack of subject matter jurisdiction. With the federal claims thus disposed, the Court will decline to exercise subject matter jurisdiction over Hoagland's remaining claims.

A. The Ordinances Are Not Preempted By Federal Law

Hoagland's first federal claim is that the Ordinances are preempted by the Federal Aviation Act ("FAA"), 49 U.S.C. § 40101 *et seq.* Preemption doctrine springs from the Supremacy Clause of the Constitution, which provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the land." U.S. Const., Art. VI, cl. 2. In accordance with this clause, federal law preempts state and local laws "that interfere with, or are contrary to, federal law." *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002) (internal quote marks omitted). There are three ways in which federal law can preempt state and local law: (1) express preemption; (2) conflict (or "implied") preemption; and (3) field (or "complete") preemption. *Id.* Express preemption occurs

where "a federal statute explicitly provides that it overrides" state or local law. *Id.* Conflict preemption occurs where "it is impossible for a private party to comply with both [local] and federal requirements, . . . or where [local] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995)). Finally, field preemption occurs where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (internal quote marks omitted).

Hoagland's briefs are hazy on which of these three theories of preemption applies to this case. Although he often speaks the language of express preemption, every case he cites relies on field preemption. For completeness, the Court will consider each theory in turn.

Express preemption can only be found in the explicit language of a federal statute, *Boomer*, 309 F.3d at 417, and the FAA contains a clause discussing preemption: "[A] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b)(1). Hoagland is an "air carrier" within the meaning of this clause, [6] so the question is

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[6] The FAA defines an "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). Clear Lake does not dispute that Hoagland meets this definition.

whether the Ordinances are "related to" Hoagland's "price, route, or service."

On the face of them, the Ordinances are related to land use, rather than the price, route, or service of Hoagland's helicopter operations. Ordinance 84 is Clear Lake's master zoning plan, and its preamble states that its general purpose is to "regulate" the "use of land." (Second Am. Compl., Ex. 3 at 1.) Ordinances 268, § 154.045, and 288 amend this master plan by limiting or banning the use of land as an "aircraft landing strip, pad, or space." (Troli Aff., Ex. 8; Pl.'s Desig. of Evid., Ex. 27.) In other words, the Ordinances regulate how Hoagland uses his land, not how he operates his helicopter; any effect they might have on Hoagland's prices, routes, or service is tangential. Therefore, they are not expressly preempted by the FAA.

Turning to field preemption, Hoagland cites a slew of cases where state and local laws were found preempted because of pervasive federal regulation. However, all of these cases are distinguishable from the instant case, because none of them involve land-use regulations.

Hoagland begins with a Supreme Court decision, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 36 L. Ed. 2d 547, 93 S. Ct. 1854 (1973). The plaintiffs in *City of Burbank* challenged a local ordinance which attempted to control aircraft noise by prohibiting certain types of planes from taking off between 11 p.m. and 7 a.m. *Id.* at 625. The Court extensively reviewed the FAA and its amendment by the Noise Control Act of 1972, including the legislative history of both acts. *Id.* at 626-38. The Court acknowledged that the noise-control ordinance was not expressly preempted, but nonetheless held that "the pervasive nature of the scheme

of federal regulation of aircraft noise . . . leads us to conclude that there is pre-emption." *Id.* at 633.

Hoagland cites several lower-court cases which rely on *City of Burbank* to strike down noise control ordinances. However, none of these cases involves a regulation of land use; rather, all of them rely on *City of Burbank's* finding that federal regulation of *aircraft noise* is too pervasive to allow state or local regulation. *Pirolo v. City of Clearwater*, 711 F.2d 1006, 1008 (11th Cir. 1983) (preempting local ordinances "prohibiting night operations" and "prescribing air traffic patterns"); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1308, 1312 (9th Cir. 1981) (preempting "curfew on aircraft flights"); *Price v. Charter Township of Fenton*, 909 F. Supp. 498, 505 (E.D. Mich. 1995) (preempting ordinance that "limited the frequency of flights of certain [noisy] airplanes"); *Blue Sky Entm't, Inc. v. Town of Gardiner*, 711 F. Supp. 678, 695 (N.D.N.Y. 1989) (preempting town law which, *inter alia*, "attempted to regulate the noise generated by aircraft taking-off and landing at the airports"); *United States v. City of Blue Ash, Ohio*, 487 F. Supp. 135, 135, 137 (S.D. Ohio 1978) (preempting ordinance requiring departing planes to make "Noise Abatement Turns"), *aff'd*, 621 F.2d 227 (6th Cir. 1980).

In a similar vein, Hoagland also cites several cases which apply the reasoning of *City of Burbank* to state and local attempts to regulate air safety. But again, none of these cases deals with a regulation of land use, such as the one at issue in this case; rather, they hold that pervasive federal regulation of *air safety* leaves no room for state and local safety regulations. *See Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 364, 367 (3rd Cir. 1999) (preempting state standards of care for air safety); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 1, 6-7 (1st Cir. 1989) (preempting state statute

regulating subjection of pilots to drug testing); *United States v. City of Berkeley*, 735 F. Supp. 937, 938, 941 (E.D. Mo. 1990) (preempting building code's prevention of radar system installation due to "pervasive" federal regulation of "airspace management, air navigation facilities, and air safety" and interference with federal statutory objective); *Command Helicopters, Inc. v. City of Chicago*, 691 F. Supp. 1148, 1148, 1150 (N.D. Ill. 1988) (preempting ordinance requiring certain equipment for helicopter external-load lifting).

The only case cited by Hoagland which comes close to supporting his argument is a Ninth Circuit decision, *Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338 (1992). That case involved a local ordinance "requiring prior submission and approval of any plans for development on a parcel of Airport land that is used exclusively for airplane landings and takeoffs. *Id.* at 1339. The court declared that "it is settled law that non-proprietor municipalities are preempted from regulating airports in any manner that directly interferes with aircraft operations," citing *City of Burbank* and *Gianturco* for the proposition. *Id.* at 1340. With little further analysis, the court found the ordinance preempted. *Id.* at 1340-41.

Hoagland seizes on this case, particularly its interpretation of *City of Burbank*, to argue that Clear Lake's land-use regulations are similarly preempted. However, this Court declines to follow *Burbank-Glendale-Pasadena*, partly because it is not controlling authority, but mostly because it is unpersuasive. The Ninth Circuit cited only two cases in support of its finding, and it misstated the holdings of those cases. As explained *supra*, *City of Burbank* and *Gianturco* do not hold that the FAA preempts any regulation "that directly interferes with aircraft operations"; rather, they stand for the much narrower proposition that the FAA preempts regulation

of aircraft noise. *See City of Burbank*, 411 U.S. at 633 ("the pervasive nature of the scheme of federal regulation of *aircraft noise* . . . leads us to conclude that there is preemption" (emphasis added)); *Gianturco*, 651 F.2d at 1316 (preempting flight curfew because it impinged on "airspace management" and "federal control of *aircraft noise*" (emphasis added)). In short, *Burbank-Glendale-Pasadena* is cursorily and poorly reasoned, and thus this Court joins others that have declined to follow it. *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F. Supp. 742, 751 (N.D. Ohio 1995) ("[*Burbank-Glendale-Pasadena's*] view of the scope of the Aviation Act is simply broader than that implied in any reasonable reading of the statute"); *In re Commercial Airfield*, 170 Vt. 595, 752 A.2d 13, 16 (Vt. 2000) ("we find the Ninth Circuit's cursory review of the preemption issue unhelpful . . . and decline to follow [it]"); *see also People v. City of Chicago*, 329 Ill. App. 3d 477, 769 N.E.2d 84, 94, 263 Ill. Dec. 882 (Ill. App. Ct. 2002), *rev'd in part on other grounds*, 202 Ill. 2d 36, 779 N.E.2d 875, 269 Ill. Dec. 21 (Ill. 2002). To sum up, Hoagland does not provide any persuasive cases holding that state and local land-use regulations are preempted due to pervasive federal regulation. However, several cases hold the precise opposite: that the FAA leaves state and local governments free to regulate land use.

The most prominent of these cases is *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996). *Gustafson* featured an ordinance prohibiting the landing of seaplanes on a local lake. *Id.* at 780. The Court first distinguished *City of Burbank*, noting that it only dealt with federal regulation of aircraft noise, not regulation of aircraft landing sites. *Id.* at 784. The court then reviewed the pertinent federal statutes and administrative regulations and concluded that "federal preemption of the airspace under the Act does not limit the right of local governments to designate and regulate aircraft

landing areas." *Id.* at 790. Accordingly, it held that the ordinance was not preempted.[7] Id.

Many other state and federal courts, applying similar reasoning, have found that regulation of landing sites, or land-use regulations in general, are not subject to field preemption. *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 219 (8th Cir. 1990) ("We see no conflict between a city's regulatory power over land use and the federal regulation of airspace"); *Broadbent v. Allison*, 155 F. Supp. 2d 520, 524 (W.D.N.C. 2001) ("deciding whether to allow planes to land and takeoff from a certain location is a quintessential land use issue over which state and local governments possess near-plenary authority"); *City of Cleveland*, 893 F. Supp. at 751("The Federal Aviation Act does not occupy the field of land use regulations"); *Faux-Burhans v. County Comm'rs of Frederick County*, 674 F. Supp. 1172, 1173-74 (D. Md. 1987) (holding that "zoning restrictions on private airfield operations" are not preempted), *aff'd*, 859 F.2d 149 (4th Cir. 1988); *City of Chicago*, 769 N.E.2d at 93 ("the [FAA] does not preempt state and local ordinances that regulate land use without directly regulating the flight operations of aircraft in navigable airspace"); *Tanis v. Township of Hampton*, 306 N.J. Super. 588, 704 A.2d 62, 67 (N.J. Super. Ct. App. Div. 1997) (rejecting plaintiff's argument that "township's authority to adopt or apply land use regulations to prohibit a private landing strip is preempted"); *In re Commercial Airfield*, 752 A.2d at 16 ("the federal government has not pervasively occupied the field of land-use regulations relating to aviation"). And one case, although somewhat dated,

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[7] Along the way, the court also persuasively distinguished three cases upon which Hoagland now relies: *Blue Sky Entm't*, *Price*, and *Command Helicopters*. *See Gustafson*, 76 F.3d at 786-88.

specifically found that state and local regulation of private helicopter pads (such as Hoagland's) are not preempted. *Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 390 A.2d 1177, 1182 (N.J. 1978) ("federal legislation and regulation have not preempted state and local jurisdiction with respect to the placement of private helistops").

In short, the clear weight of federal and state case law supports Clear Lake's contention that the Ordinances are not subject to field preemption. Moreover, the cases that Hoagland cites in favor of preemption are either irrelevant or unpersuasive. Accordingly, the Court finds that as a matter of law, the Ordinances are not preempted by federal law.

B. Hoagland's Potential Takings Clause Claim Is Premature

Hoagland also asserts a claim of inverse condemnation; that is, he contends that the restrictions placed on him by the Ordinances amount to a government taking for which he deserves compensation under the Fifth Amendment. *See* U.S. Const. amend. V. But whatever the merits of this claim may be, it is not ripe for adjudication in this Court.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." *Id.* This limit on government power is applicable to the States under the Fourteenth Amendment. *E.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998). In some circumstances, "the application of a general zoning law to particular property" can constitute a taking for which compensation is due. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). Relying on

Agins and its progeny, Hoagland asserts an inverse-condemnation claim against Clear Lake.[8]

However, in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the Supreme Court held that a Fifth Amendment takings claim is not ripe unless the plaintiff has first sought compensation through state procedures. As the Court put it:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. . . . Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. . . . [Thus], if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. at 194-95 (internal citations and quote marks omitted). The Court then noted that Tennessee, the state at issue, recognizes inverse-condemnation claims seeking compensation for takings. *Id.* at 196. Because the claimant had not used that procedure, the Court found the Fifth Amendment claim premature. *Id.* at 196-97. Like Tennessee,

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[8] "Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Agins*, 447 U.S. at 258 n.2 (internal quote marks omitted).

Indiana provides a state-law cause of action for inverse condemnation, *see* Ind. Code § 32-24-1-16, and thus Hoagland cannot sustain a taking claim in this Court unless he has unsuccessfully sought compensation in an Indiana court. *SGB Fin. Servs., Inc. v. Consol. City of Indianapolis-Marion County, Indiana*, 235 F.3d 1036, 1037-38 (7th Cir. 2000); *Beachy v. Bd. of Aviation Comm'rs of Kokomo, Indiana*, 699 F. Supp. 742, 745-46(S.D.Ind. 1988).[9]

Hoagland argues that he met this requirement during Clear Lake's 1999 state-court lawsuit against him, since one of his counterclaims in that suit alleged that certain actions by Clear Lake "constituted an inverse condemnation" of his real estate. (Pl.'s Desig. of Evid., Ex. 7 P 35.) However, that counterclaim was filed on April 7, 2000 (*id.* at 11), and Hoagland's Fifth Amendment claim in this Court is based on amendments to the Ordinances that were not adopted until April 9, 2001 (*see* Second Am. Compl. PP 50-55). Thus, the taking of which Hoagland complained in state court cannot

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[9] Hoagland makes a poorly developed argument that, contrary to *Williamson County* and its progeny, he is not required to exhaust state inverse-condemnation procedures before asserting a Fifth Amendment claim. (*See* Pl.'s Resp. To Def.'s Mot. for Summ. J. at 13.) He cites *Zinermon v. Burch*, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990), and *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), in support of his argument, but neither of those cases deals with a Fifth Amendment taking claim, and Hoagland does not explain how they relate to this case or negate the clear holding of *Williamson County*. Hoagland also attempts to salvage his taking claim by making several arguments why he should not have to exhaust his *administrative* remedies (Pl.'s Resp. at 14-16), but these are irrelevant, as the requirement of exhausting his *state-court* remedies is at issue.

possibly be the same taking that he alleges in this forum; in other words, he has not sought compensation in Indiana courts for the injury he now alleges.

But even assuming *arguendo* that Hoagland's counterclaim in the 1999 litigation *was* based on the same injury he now alleges, his claim still fails because he has not shown that the counterclaim was unsuccessful. *Williamson County* requires a plaintiff to show not only that he used the available state procedures, but that he was "denied just compensation." 473 U.S. at 195. Hoagland and Clear Lake entered into a partial settlement of their claims in the 1999 litigation, and then the remainder of the case went to trial, at which Hoagland won an award of $ 14,716.91. While the record is murky on which of Hoagland's many counterclaims in that case were settled and which went to trial, there is no indication that any of them were dismissed, thrown out on summary judgment, or rejected by the jury. In other words, to the extent that the 1999 lawsuit included Hoagland's current taking claim, he cannot show that he was denied just compensation, because he either settled that claim or secured a favorable verdict on it. Thus, his taking claim is premature under *Williamson County* and its progeny.[10]

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[10] The Court can conceive of an argument by Hoagland, though he has not made it, that the $ 14,716.91 verdict undervalued his loss, and that he therefore was denied just compensation in Indiana's courts. (This assumes that the verdict was for his inverse-condemnation claim and not some other claim -- again, the record is unclear.) But even if this were the case, he would have to appeal the verdict in order to fully exhaust Indiana's inverse-condemnation remedies, and there is no indication that he has done so.

In sum, Hoagland has not shown that he has used Indiana's inverse-condemnation procedure for the taking claim he now presents, and even if he had, he could not possibly show that he was denied just compensation. Accordingly, his taking claim is not ripe and must be dismissed for lack of subject matter jurisdiction. *Patel v. City of Chicago*, 383 F.3d 569, 573 (7th Cir. 2004) ("We have subject matter jurisdiction over only those takings claims for which the *Williamson County* requirements are satisfied or otherwise excused." (internal quote marks omitted)).

C. Hoagland's § § 1983, 1985, and 1986 Claims Are Barred by the Statute of Limitations

Hoagland's complaint and summary judgment briefs also contain a confusing mishmash of civil-rights claims. He invokes three federal statutes: (1) 42 U.S.C. § 1983, which imposes liability on state actors who deprive individuals of federal constitutional rights; (2) 42 U.S.C. § 1985, which imposes liability on those who conspire to deprive others of equal protection of the laws; and (3) 42 U.S.C. § 1986, which imposes liability on anyone who has knowledge of a § 1985 conspiracy, has the power to prevent its implementation, and neglects to do so.

The meat of Hoagland's civil-rights claims are his § 1983 claims, but he is terribly vague as to which of his federal constitutional rights were allegedly violated by Clear Lake. For instance, he asserts that, in bringing the 1999 state-court suit against him, Clear Lake violated his "civil right to be free from capricious, vexatious and/or unwarranted litigation," without citing any constitutional provision or case establishing such a right. (Mem. in Supp. of Pl.'s Mot. for Summ. J. at 27.) He also alleges that the 1999 suit deprived him of equal protection under the law, but he does not even begin to

explain how this is so.[11] Similarly, he claims that Clear Lake deprived him of equal protection of the law when it used "false representations to extract onerous use restrictions" in the settlement of the 1999 suit, with little further explanation. (*Id.*) Finally, he charges that Clear Lake's enactment of the Ordinances deprived him of both equal protection and "due process" because "they effectively took [his] property rights without reasonable notice and a meaningful opportunity to be heard."[12] (*Id.* at 28.) Hoagland then claims that, in addition to violating § 1983, each individual defendant either violated § 1985 by conspiring to commit those violations or violated § 1986 by knowing of such conspiracies and failing to prevent their implementation.

Clear Lake responds that whatever form these indeterminate civil-rights claims might eventually take, they cannot succeed because they are barred by the statute of limitations. The statute of limitations used for § 1983 claims

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[11] Equal protection claims generally involve "charges of singling out members of a vulnerable group," such as a racial minority, or "charges that a law or policy makes irrational distinctions between groups of people." *Bell v. Duperrault*, 367 F.3d 703, 707 (7th Cir. 2004). There are also "class of one" equal protection claims, where the plaintiff alleges that only he, rather than a group of people, has been singled out for irrational treatment. *Id.* Hoagland does not even identify one of these theories of equal protection, much less apply one to the facts of his case.

[12] This sounds like a procedural due-process claim, *see, e.g., Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010-11 (7th Cir. 2002), but Hoagland does not bother to explain further -- even though he demands a grant of summary judgment in his favor on this claim.

is the statute of limitations for personal injury claims in the state where the alleged § 1983 violations took place, *King v. One Unknown Fed. Corr. Officer*, 201 F.3d 910, 913 (7th Cir. 2000), which is two years in Indiana, Ind. Code § 34-11-2-4. The same goes for § 1985 claims, *Wilson v. Giesen*, 956 F.2d 738, 741 n.4 (7th Cir. 1991), and § 1986 contains a one-year statute of limitations, *see* 42 U.S.C. § 1986. Here, Hoagland bases his civil-rights claims on three actions by Clear Lake: (1) the filing of the 1999 state-court suit against him, which occurred on August 12, 1999; (2) the alleged misrepresentations during settlement negotiations, which occurred on April 14, 2000; and (3) the enactment of the Ordinances, which were last substantively amended on April 9, 2001. All three of these events occurred more than two years before Hoagland filed the instant case on June 23, 2003.

Because it therefore appears that the statute of limitations bars all of Hoagland's civil-rights claims as a matter of law, the burden shifts to Hoagland to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). To that end, he makes three attempts to get around the statute of limitations, none of which are persuasive.

Hoagland first argues that his claims are saved by the continuing violation doctrine, which "allows a plaintiff to get relief for time-barred acts by linking them with acts within the limitations period." *Shanoff v. Ill. Dep't. of Human Servs.*, 258 F.3d 696, 703 (7th Cir. 2001). To rely on this doctrine, the plaintiff must show "a continuing violation," which the Seventh Circuit has described as "a continuous series of events giving rise to a cumulative injury." *Heard v. Sheahan*, 253 F.3d 316, 320 (7th Cir. 2001). Hoagland offers several recent events as evidence of a continuing violation, including: (1) Clear Lake's alleged failure "to honor the Settlement Agreement"; (2) Clear Lake's letter to the FAA, which

allegedly contained a false statement and urged the FAA to deny Hoagland a "Public Use Designation"; (3) the parties' recent "motions practice" in the 1999 suit; and (4) the publication of the erroneous Ordinance § 154.045. (*See* Pl.'s Resp. to Def.'s Mot. for Summ J. at 20-21.) However, after recounting these events in detail, Hoagland simply declares that they are "inextricably tied" to the time-barred events underlying his civil-rights claims, with no further explanation and no supporting authority. (*Id.* at 21-22.) He does not explain how these recent events contributed to any "cumulative injury" to his constitutional rights such that the continuing violation doctrine would apply. *Heard*, 253 F.3d at 320. This is not surprising, since (as described above) the alleged constitutional violations underlying his civil-rights claims are so vague as to be inscrutable. In short, Hoagland fails to develop any argument proving a continuing violation of § § 1983, 1985, and 1986, and thus he cannot rely on that doctrine to evade the statute of limitations. *Cf. DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1168 (7th Cir. 1994) ("An issue must be pressed, must be argued and supported; a bare conclusion is not enough. ")

Hoagland next argues that the "discovery rule" saves his claims from the statute of limitations. This rule "postpones the beginning of the limitations period to the date when the plaintiff discovers or should have discovered that he has been injured." *Clark v. City of Braidwood*, 318 F.3d 764, 767 (7th Cir. 2003). For instance, under the statute of limitations at issue here, a claim accrues "when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999). Hoagland claims he did not know that Clear Lake violated his rights until he "learned that there was no Town ordinance in effect at any time from 1997 until 2001 which

would actually prohibit the use of [his] . . . helipads." (Pl.'s Resp. at 22.) But Hoagland fails to grapple with the obvious fact that he *could* have discovered the lack of such an ordinance at any time, had he (or his counsel) exercised "ordinary diligence." *Martin*, 711 N.E.2d at 1279. Clear Lake's town council, like every local legislative body in Indiana, is required to record all its ordinances "in a book kept for that purpose." Ind. Code § 36-4-6-17. Moreover, Clear Lake's ordinances are "public records," Ind. Code § 5-14-3-2, so Hoagland (like every other person) has a statutory right to inspect and copy them at any time during business hours, Ind. Code § 5-14-3-3. Hoagland fails to explain why he did not exercise this right; he instead offers the conclusory allegation that he "could not obtain a copy" of the ordinances until 2003.[13] (Pl.'s Resp. at 22.) This unsupported, undeveloped argument is no reason to postpone the beginning of the limitations period; the discovery rule therefore cannot save Hoagland's claims.[14]

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[13] Hoagland implies that Clear Lake somehow wrongfully withheld the ordinances from him: "[Clear Lake] never produced a copy of [its ordinances] at any time before 2003, despite the repeated requests of the Hoaglands' counsel for copies of any ordinances supporting [Clear Lake's] lawsuit against the Hoaglands." (Pl.'s Resp. at 22.) This claim is unsupported by any citation to the record, and thus it is insufficient to show ordinary diligence on Hoagland's part.

[14] Hoagland also argues that he could not have discovered his alleged injuries until Ordinance § 154.045 was published and/or until Clear Lake failed to abide by the Settlement Agreement, but these arguments are as conclusory and unsupported as the one discussed *supra*.

Finally, Hoagland argues that Clear Lake is equitably estopped from invoking the statute of limitations. Equitable estoppel applies where the following elements are present: (1) a misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on that misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel. *Labonte v. United States*, 233 F.3d 1049, 1053 (7th Cir. 2000). Hoagland claims that this doctrine applies here, largely because Clear Lake allegedly misrepresented "the existence of extant ordinances . . . supporting its lawsuit against the Hoaglands." (Pl.'s Resp. at 23.) But equitable estoppel requires *reasonable* reliance on the misrepresentation, *Labonte*, 233 F.3d at 1053; *Wheeldon v. Monon Corp.*, 946 F.2d 533, 537 (7th Cir. 1991), which Hoagland cannot show. Quite simply, if a town sues you, and its lawsuit is based on the falsehood that it has an ordinance supporting its position, it is not reasonable to rely on that falsehood when you have a statutory right to inspect the town's ordinances at any time. Ind. Code § 5-14-3-3. Thus, equitable estoppel is inapplicable here.

In sum, Hoagland fails to demonstrate any genuine issue of fact which precludes the statute of limitations from barring his civil-rights claims. Accordingly, Clear Lake is entitled to summary judgment on those claims.

D. Supplemental Jurisdiction Should Not Be Exercised Over Hoagland's Remaining Claims

Since Hoagland's remaining claims do not arise under federal law, *see* 28 U.S.C. § 1331, and since he does not claim diversity jurisdiction, *see* 28 U.S.C. § 1332, the only possible jurisdictional basis for the remaining claims is supplemental jurisdiction under 28 U.S.C. § 1367. However, "the general rule is that, when all federal claims are dismissed

before trial, the district court should relinquish jurisdiction over [supplemental] state-law claims rather than resolving them on the merits." *E.g., Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 727 (7th Cir. 1998) (citing 28 U.S.C. § 1367(c)(3)). This rule counsels dismissal of Hoagland's state-law claims.

Courts may also decline to exercise supplemental jurisdiction if the supplemental claims raise "novel or complex issues of state law." 28 U.S.C. § 1367(c)(1). Hoagland's supplemental claims certainly fit this description; for example, Hoagland asks this Court to declare that Clear Lake, an Indiana town, has never been "recognized as a legal entity," or in the alternative, determine the town's physical boundaries. (*See* Pl.'s Mem. in Supp. at 20-22.) These provincial issues are best left to the decision of an Indiana state court.

For both of these reasons, the Court declines to exercise supplemental jurisdiction over Hoagland's remaining claims.

V. CONCLUSION

For the reasons given above, Clear Lake's motion for summary judgment (Docket # 54) is GRANTED as to Hoagland's claim of federal preemption and all his claims under 42 U.S.C. § § 1983, 1985, and 1986. The Clerk is directed to enter judgment in favor of Clear Lake and against Hoagland accordingly. Hoagland's claim under the Takings Clause of the Fifth Amendment and all of his state-law claims are DISMISSED for lack of subject matter jurisdiction, and Clear Lake's motion for summary judgment is DENIED as to all of those claims (as it is moot). Hoagland's motion for summary judgment (Docket # 59) is DENIED in full.

A few loose ends remain. Clear Lake's two motions to strike (Docket # 61, 73), its motion for leave to file supplemental affidavits (Docket # 74), and Hoagland's motion to strike (Docket # 68) need not be resolved to decide this case, and thus they are DENIED as moot. Finally, Hoagland's motion for oral argument (Docket # 72) is DENIED, as it is difficult to imagine what the parties could say in person that they were not able to say in the 204 pages of briefs submitted to this Court.

Enter for this 28th day of October, 2004.

Roger B. Cosbey,
United States Magistrate Judge